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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

REBECCA GOLDSTEIN, Plaintiff and Appellant, v. MICHAEL F. KIRBY et al., Defendants and Respondents.	G045165 (Super Ct. No. 30-2010-00420001) O P I N I O N
REBECCA GOLDSTEIN, Plaintiff and Appellant, v. ADAM MARKMAN, Defendant and Respondent.	G045563

Appeals from judgments and orders of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Affirmed.

Reich Radcliffe & Kuttler, Marc G. Reich and Richard J. Radcliffe; Dykema Gossett, and Ronald M. Greenberg, for Plaintiff and Appellant.

North, Nash & Abendroth, Vicki A. Nash and Douglas W. Abendroth, for Defendants and Respondents Michael F. Kirby, Suzette R. Kirby, Jon A. Fosheim, Penny L. Fosheim, John Lutzius, Alison Cohen, Lynn Lewis, James P. Sullivan, Sarah Sullivan, Craig A. Leupold, Stephanie Leupold, and Warner Griswold.

Grant, Genovese & Baratta, David C. Grant and Marcus G. Larson, for Defendant and Respondent Adam Markman.

* * *

INTRODUCTION

In these two appeals, we deal primarily with the accrual of a cause of action for breach of the fiduciary duty owed by majority shareholders to minority shareholders. Appellant Rebecca Goldstein (Appellant) seeks reversal of separate judgments granted in favor of two categories of respondents. In one is her ex-husband, Adam Markman. The other category consists of Michael and Suzette Kirby, Jon and Penny Fosheim, John Lutzius, Alison Cohen, Lynn Lewis, James and Sarah Sullivan, Craig and Stephanie Leupold, and Scott Griswold (Respondents).[1] Respondents obtained a judgment of dismissal following the sustaining of their demurrer without leave to amend. Markman later obtained a judgment of dismissal after the court granted his motion for judgment on the pleadings without leave to amend. Appellant separately appealed from both judgments; we have consolidated the appeals for oral argument and decision.

Both the demurrer and the motion rested on the same basis: Appellant's claims were time-barred. She had waited too long to assert her claim that a corporate reorganization arranged by Markman and Respondents breached their fiduciary duties to her as a minority holder of stock in a company of which they were majority stockholders. Her other claims for breach of fiduciary duty, negligence, breach of contract, and interference with contractual relations were similarly time-barred.

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1 Appellant's complaint is not consistent in the spelling of some of the surnames, and we adopt the first spelling of each one.

We affirm both judgments. We agree with the trial court's reasoning that the limitation period on Appellant's first cause of action for breach of fiduciary duty began to run when her stock became restricted. The parties have agreed that event took place in May 2006. The remaining causes of action had, for the most part, even shorter limitations periods. The trial court correctly dismissed the lawsuit without leave to amend.

FACTS

Appellant and Markman married in 1993. They separated in 2002 and divorced in 2004. During their marriage, they acquired stock in Green Street Advisors, Inc. (GSA), a California firm providing research and consulting for publicly traded real estate companies and real estate investment trusts. Respondents, Markman, and Appellant together held the majority of GSA's stock. Markman also worked for GSA; Appellant did not. When Appellant and Markman divorced, they split their GSA stock evenly as part of the property settlement, pursuant to a judgment entered in April 2005. Appellant became a minority shareholder, with 3 percent of GSA's stock.

In 2006, Respondents and Markman formed a new Delaware corporation, Green Street Holdings, Inc. (GSH). After some corporate musical chairs with related business entities, GSA wound up as a wholly owned subsidiary of GSH. The reorganization required GSA stockholders to exchange their GSA stock for GSH stock.

Under GSH's rules, as set forth in its certificate of incorporation, nonemployees could not hold its stock. In the case of nonemployees who owned GSA stock before the reorganization (such as Appellant), the certificate of incorporation provided a compulsory repurchase mechanism, whereby the company could require nonemployee shareholders to relinquish their stock. Under the new rules, stockholders could not transfer their shares without GSH's permission and could not transfer them to any but a "qualified shareholder," that is, a person or entity with one of the specified connections to GSH.

Appellant was informed by letter, dated May 10, 2006, about the pending reorganization and about the restrictions on stock ownership and sale. She did not consent to the GSA/GSH reorganization.

In February 2008, Appellant sold some of her GSA shares, allegedly because she was afraid she might get less money for them if she sold them later.[2] She alleged that she lost money because she had to accept payment over time and had to pay a brokerage fee and "discounts." She also alleged that her remaining stock was diminished in value because of the sale.

In September 2010, Appellant moved in the family law court to modify the child support Markman was paying for the former couple's two children. As part of her motion, Appellant explained to the court about the reorganization and how it had disadvantaged her. Had she known about the reorganization before she agreed to divide the GSA stock with her ex-husband, she asserted, she would not have taken the stock as part of her share of the community, or she would have demanded more money for spousal and child support. Furthermore, reorganization must have been in the works while the property-settlement negotiations were going on, her ex-husband must have known about it (because of his high position at GSA), and therefore he breached his fiduciary duty to her by not telling her about the reorganization before the settlement was finalized. Appellant also referred to her 2008 stock sale in her motion in the family law court. One of the things she wanted the family court to do was to order her ex-husband to take her remaining GSA shares back, to collect the dividends from those shares, and to pass the money along to her.

As an exhibit to this motion in the family law court, Appellant attached the May 10, 2006 letter, from GSA's CEO informing the shareholders of the coming reorganization and explaining that nonemployees could not hold stock in the new

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2 This sale was *not* the result of GSH's exercising its right of repurchase.

company. This letter also explained the repurchase mechanism. In her declaration, Appellant acknowledged receiving this letter and declared she refused to execute the accompanying consent documents.[3]

In October 2010, Appellant filed suit in Orange County Superior Court against Markman and Respondents for breach of fiduciary duty, constructive fraud, negligence, breach of contract (against Markman only) and interference with contractual relations (against Respondents only). The breach of fiduciary duty cause of action was based on the duty of majority shareholders to minority shareholders. The constructive fraud claim was based on Markman's breach of his fiduciary duty to her in the divorce – by not telling her about the reorganization – and the Respondents' conspiracy to help him breach his duty. The negligence cause of action alleged a generic breach of the duty of care, based on the reorganization and its effects on her. The contract-based claims alleged a contract between Markman and Appellant to split the GSA shares evenly as part of their divorce. Markman allegedly breached the contract when he engineered the reorganization, and Respondents interfered with the contract when they did the same.

Respondents demurred to the causes of action against them. The trial court sustained the demurrer without leave to amend, because all of Appellant's claims were time-barred. The triggering event was "the change in [Appellant's] ownership rights." Judgment in Respondents' favor was entered on February 23, 2011.

Approximately a month after entry of Respondents' judgment, Markman moved for judgment on the pleadings. He successfully advanced essentially the same arguments Respondents had made in their demurrer. Judgment was entered in Markman's favor in June 2011.

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[3] Perhaps anticipating a question about delay, Appellant also declared, "I previously sought legal advice to address the legality of my disqualification of stock ownership and the resulting forced auction sales of my shares, but my mother was diagnosed with a terminal illness and I was distracted by family matters from pursuing my rights."

DISCUSSION

On appeal from the dismissal of an action after a demurrer has been sustained, we exercise our independent judgment to determine whether the complaint states a cause of action under any theory. (*City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 869.) We accept as true all properly pled material facts, all facts that may be inferred from the allegations, and all matters that can be judicially noticed. (*Id.* at pp. 869-870.) A demurrer on statute of limitations grounds is proper if the grounds appear on the face of the complaint or are revealed in matters that can be judicially noticed. (*Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (2011) 200 Cal.App.4th 1470, 1482.) The same standard of review applies to the dismissal of an action after a motion for judgment on the pleadings has been granted. (*Heredia v. Farmers Ins. Exchange* (1991) 228 Cal.App.3d 1345, 1358-1359.)

When a demurrer has been sustained without leave to amend, we review the decision to deny amendment for abuse of discretion. The trial court abuses its discretion when it denies leave to amend if there is a reasonable possibility an amendment would cure the defects. It is, however, the plaintiff's burden to show how the complaint could be amended. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386.)

I. Judicial Notice

Respondents and Markman asked the trial court to take judicial notice of several documents. One document was a copy of a Delaware Certificate of Incorporation for GSH, showing an initial incorporation date of January 4, 2006, and a restated date of May 30, 2006. The certificate included Article IX, the provision restricting transfer of GSH shares and setting out the compulsory repurchase feature. Another document was a copy of the agreement of merger, dated May 30, 2006, and filed with the State of California, whereby GSA became a subsidiary of the Delaware corporation that owned GSH. A third was Appellant's voluminous filing in the family law court on September

22, 2010, whereby she sought, among other things, to make Markman take back her GSA shares. This package included (1) Appellant's lengthy declaration, in which she admitted receiving notice of the impending reorganization in May 2006; (2) the April 2005 judgment disposing of the community's interest in GSA stock; (3) the judgment of June 2, 2005, determining the issues reserved from the earlier judgment; and (4) a letter from GSA dated May 10, 2006, explaining the reorganization in detail, including the transfer restrictions and the compulsory repurchase. The court granted the requests for judicial notice.

"[A] pleading valid on its face may nevertheless be subject to demurrer when matters judicially noticed by the court render the complaint meritless. In this regard, the court passing upon the question of the demurrer may look to affidavits filed on behalf of plaintiff, and the plaintiff's answers to interrogatories [citation], as well as to the plaintiff's responses to requests for admission. [Citations.]" (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) "[J]udicial notice of matters upon demurrer will be dispositive only in those instances where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed." (*Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134; accord, *Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 375.)

In this case, Appellant does not dispute receiving the May 10, 2006, letter from GSA. She does not dispute the admissions she made in her family law court declaration, the attached exhibits, or the date and contents of the judgments regarding the property settlement and the reserved issues. The court could properly take judicial notice of her admissions, as well as of the two documents from the California and the Delaware Secretaries of State. (See Evid. Code, § 452, subd. (c); see also *Marek v. Napa Community Redevelopment Agency* (1988) 46 Cal.3d 1070, 1076, fn. 5; *Watson v. Los Altos School District* (1957) 149 Cal.App.2d 768, 771 [ignoring contents of exhibits from prior case would be "travesty on justice"].)

II. Respondents' Demurrer

Respondents demurred to all causes of action alleged against them: breach of fiduciary duty, constructive fraud, negligence, and interference with contract. The court sustained their demurrers without leave to amend, based on the running of the applicable statutes of limitation.

A. Accrual

The main issue argued before the trial court was the accrual of the various causes of action. Did they accrue in May 2006, when Appellant received notice of the GSA/GSH reorganization, or did they accrue later, in 2008, when she alleged she first had to sell her GSA stock? Obviously if 2006 is the correct date, her claims are time-barred, as she did not file her complaint until October 2010. If 2008 is correct, at least three- and four-year claims could be timely.

A cause of action accrues at the moment the party who owns it is entitled to bring and prosecute an action thereon. (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 822; *Collins v. County of Los Angeles* (1966) 241 Cal.App.2d 451, 454; see also *Dillon v. Board of Pension Commissioners* (1941) 18 Cal.2d 427, 430 [cause of action accrues when suit may be maintained].) Put another way, the statute begins to run "upon the occurrence of the last element essential to the cause of action" (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187) or "once plaintiff has suffered actual and appreciable harm." (*Davies v. Krasna* (1975) 14 Cal.3d 502, 514 ["neither the speculative nor uncertain character of damages . . . will toll the period of limitation"].)

1. Breach of fiduciary duty

Appellant's first cause of action against Respondents alleged a breach of their fiduciary duty as majority shareholders to her as a minority shareholder. In particular, she alleged that Respondents "breached this fiduciary duty when they

approved the reorganization of GSA; imposed and implemented the Ouster Provisions[4] without the consent of [Appellant]; and thereby singled her out as the only known nonemployee, disqualified shareholder subject to the forced sale of her ownership interests."

The leading case on shareholder fiduciary duty is *Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93 (*Ahmanson*). In that case, a minority shareholder sued the majority shareholders of a savings and loan association for breach of their fiduciary duty to her and other minority shareholders. (*Id.* at p. 101.) The defendants owned approximately 85 percent of the association stock; Jones and the other shareholders held the rest. (*Id.* at p. 102.)

Because of the way the association was organized, individual shares were quite expensive and therefore not readily marketable, even though savings and loan association stocks in general were booming. (*Ahmanson, supra*, 1 Cal.3d at pp. 102, 113.) The majority shareholders decided to address this problem by incorporating a holding company and then exchanging their association stock for stock in the holding company. The new company now held 85 percent of the association's stock and could control the association. The minority shareholders, however, could not exchange their association stock for stock in the new holding company. (*Id.* at pp. 113-114.)

The holding company then proceeded to make a public offering of its stock, accompanied by a bond. The first offering brought in $7.2 million, of which $6.2 million was to be immediately distributed to the holding company's shareholders, i.e., the former association majority shareholders. (*Ahmanson, supra*, 1 Cal.3d at p. 103.) A second round brought in more money for the holding company's shareholders. (*Id.* at p. 104.)

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[4] The "Ouster Provisions" of GSH prohibit ownership of stock by anyone but a qualified shareholder (which Appellant was not), require disqualified shareholders (such as Appellant) to sell their stock only to qualified shareholders, and provide for compulsory purchase of stock at the company's discretion.

Meanwhile the value of the association stock was declining; the holding company then offered to purchase the remaining association shares at a steep discount. (*Ibid.*)

Jones sued, and the majority shareholders successfully demurred to the complaint. The case was dismissed. (*Ahmanson, supra*, 1 Cal.3d at p. 101.) The California Supreme Court reversed. It held that Jones had stated a cause of action against the majority shareholders, in her individual capacity as a minority shareholder, because "majority shareholders, either singly or acting in concert to accomplish a joint purpose, have a fiduciary responsibility to the minority and to the corporation to use their ability to control the corporation in a fair, just, and equitable manner. Majority shareholders may not use their power to control corporate activities to benefit themselves alone or in a manner detrimental to the minority. Any use to which they put the corporation or their power to control the corporation must benefit all shareholders proportionately and must not conflict with the proper conduct of the corporation's business." (*Ahmanson, supra*, 1 Cal.3d at p. 108.) The court disagreed with the majority's argument that as long as they fully disclosed what they were doing and did not lessen the minority's holdings in the association, they owed no further duties to the minority shareholders (*id.* at p. 109); "the comprehensive rule of good faith and inherent fairness to the minority in any transaction where control of the corporation is material properly governs controlling shareholders in this state." (*Id.* at p. 112, fn. omitted.)

In this case, Appellant alleged an *Ahmanson* claim against Respondents for breach of their fiduciary duty to her. She alleged that, as majority shareholders, they manipulated the reorganization to her disadvantage as a minority shareholder. Her stock became restricted: she could sell the stock only with company permission and only to certain people, mainly employees, and it would be subject to a compulsory repurchase. (According to Appellant, GSA did not otherwise restrict ownership of its shares to its employees.) Her rights to keep and sell her stock were abridged, and she alleged the majority shareholders created these rules to give themselves an advantage at her expense.

That is the gravamen of her cause of action. When did this cause of action accrue? The answer is when Appellant's stock became subject to the new GSH rules restricting her ability to keep and sell it. By taking judicial notice, we know when Appellant learned that the reorganization was *going to* happen – through a letter from GSA dated May 10, 2006, that she acknowledged she received. We know when the pieces of the reorganization puzzle began to fall into place – when GSA became a subsidiary of the Delaware corporation that also owned GSH and when GSH was incorporated in Delaware. We know that Appellant obtained her GSA shares as her separate property pursuant to the divorce on February 27, 2006. And we know that "less than one month" after the GSA shares were transferred to Appellant, "GSA completed a so called 'reorganization' wherein the former company was merged into Green Street Holdings, Inc. ('GHS') a Delaware company." At oral argument, the parties stipulated the reorganization was completed in May 2006. At that point, Appellant's rights were impaired, and she suffered damage.

Appellant argues she was not damaged until 2008, when she had to sell some of her stock. She cites *City of Vista v. Robert Thomas Securities, Inc.* (2000) 84 Cal.App.4th 882 (*City of Vista*), for the proposition her cause of action did not accrue until she lost money selling her shares in 2008.[5] In *City of Vista*, the city had purchased securities it later decided were too speculative and therefore unsuitable as municipal investments. When it sued to get its money back, the brokers who had sold the securities asserted expired limitation periods as a defense. The appellate court reversed a summary judgment in the brokers' favor because there was a triable issue of fact as to when the city suffered monetary loss. (*Id.* at p. 877.) According to one expert, it was not possible

[5] This sale did not take place under GSH's compulsory repurchase provision. As Appellant acknowledges, the provision could not take effect against her until 2009.

to know whether an investor had suffered a loss on this kind of investment until close to the time the last payment was due.[6] (*Ibid.*)

Ahmanson disposes of Appellant's argument that she was not damaged until she sold some stock in 2008. The minority shareholder in *Ahmanson* did not have to sell her association stock and take a loss before she could state a cause of action against the majority shareholders. In fact, she still had all her association shares. If she won at trial, she proposed to tender her association shares to the defendants and receive in return a payment in the amount she would have received if her stock had been exchanged for holding company stock at the same time the majority shareholders exchanged theirs.[7] The defendants for their part protested that Jones had not been damaged and that she was trying to free-ride on their success after they had taken all the risk. (*Ahmanson, supra*, 1 Cal.3d at pp. 115-116.)

The court held the minority shareholder was damaged when the majority effected a "fundamental corporate change" that drastically altered the minority shareholder's position in the corporation. (*Ahmanson, supra*, 1 Cal.3d at p. 116.) As the court stated, "[T]he exchange [of stock in the holding company for stock in the association] was an integral part of a scheme that the defendants could reasonably foresee would have as an incidental effect the destruction of the potential public market for Association stock. The remaining stockholders would thus be deprived of the opportunity to realize a profit from those intangible characteristics that attach to publicly marketed stock and enhance its value above book value. . . . *Since the damage is real, although the amount is speculative*, equity demands that the minority stockholders be

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[6] *City of Vista* was a fraud case (*City of Vista, supra*, 84 Cal.App.4th at p. 889), and a fraud cause of action requires "'actual monetary loss.'" (*Id.* at p. 888, quoting *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240.)

[7] Appellant had effectively requested a very similar remedy in the family law court. She asked the court to make her ex-husband take over her portion of the GSA stock, collect the dividends, and give the money to her. Because he is a GSA employee, he would not be subject the compulsory repurchase, at least so long as he continued to work there. She made it quite clear she understood her rights pertaining to her stock had been diminished by the reorganization.

placed in a position at least as favorable as that the majority created for themselves." (*Id.* at pp. 117-118, italics added; see also *Crain v. Electronic Memories & Magnetics Corp* (1975) 50 Cal.App.3d 509, 522 [minority stockholders stated claim when majority sold corporation's business and assets].)

Appellant alleges the same drastic corporate change and the same drastic alteration in her position. Before reorganization she could sell her GSA stock to a wide category of people; afterwards she could sell only to "qualified shareholders" as defined in the GSH certificate of incorporation. She had to have company permission to sell to anyone. The stock was also subject to compulsory repurchase, which was under GSH's complete control. In effect, the stock was no longer marketable to anyone outside GSH. Appellant had therefore suffered actual and appreciable harm. She could have stated her *Ahmanson* cause of action against Respondents as soon as the reorganization was complete and the restrictions were imposed on her stock.

Appellant contends her cause of action did not accrue then because she suffered no "damage" until she sold stock in 2008. Appellant equates "damage" and monetary loss. Monetary loss is a kind of damage, but it is not the only kind. "The loss or diminution of a right or remedy constitutes injury or damage. [Citation.] Neither uncertainty of amount nor difficulty of proof renders that injury speculative or inchoate." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 744.) Appellant was damaged when her rights in her GSA stock were, as she alleged, impaired or diminished to benefit the majority shareholders at her expense. There is nothing speculative or threatened about this impairment.

Appellant's stock became subject to the GSH restrictions before October 2006, and her *Ahmanson* cause of action is indeed time-barred. The court properly sustained Respondents' demurrer to this cause of action.[8]

2. Negligence

Appellant's negligence cause of action simply states in generic terms that Respondents owed her a duty of care, which they breached. She incorporates by reference the allegations concerning GSA's reorganization and the detrimental effect it had on her stock and its dividends, as well as the sale of some of her stock in February 2008.

We have been unable to locate any authority for the proposition that majority shareholders owe a duty of care to minority shareholders, other than what would be encompassed in their fiduciary duty – as set forth in *Ahmanson* – not to use their ability to control the corporation for their own benefit and to the detriment of minority shareholders. (See *Ahmanson, supra,* 1 Cal.3d at p. 109.) *Directors* have a duty of care to the corporation and its shareholders, defined in Corporations Code section 309 as the care, "including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances."[9] A cause of action for breach of this duty is, however, subject to the business judgment rule (see, e.g. *Biren v. Equality Emergency Medical Group, Inc.* (2002) 102 Cal.App.4th 125, 136-137) and will often have to be

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[8] Appellant has also attempted to evade the bar of the statute of limitations by alleging a conspiracy among Respondents and Markman to deprive her of her stock by means of the reorganization, in breach of their fiduciary duty to her as majority shareholders. She then argues that the limitations period does not begin to run on a conspiracy until the "last overt act." (See *Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 786.) She alleges the "last overt act" to be the sale of her shares in 2008, which she alleges she was "forced" to do.

But the last overt act in this particular conspiracy was the completion of the reorganization. (The conspiracy can hardly be said to include actions of its victim.) Voting to approve the reorganization was the final action within Respondents' and Markman's power to perform as shareholders. GHS is a Delaware corporation, and shareholders of Delaware corporations cannot manage the company or implement policy; that power is held exclusively by the board of directors. (8 Del. Code, § 141, subd. (a).)

Appellant specifically disclaimed any intention of suing the defendants as directors. She also told the trial court that a "passing reference" to conspiracy in the first cause of action did not make it the claim's "primary thrust."

[9] Appellant alleged that some of the Respondents were also GSA directors.

brought as a derivative action. (See, e.g., *Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108.)

Assuming Appellant could state a negligence cause of action against all or some of the Respondents as shareholders or directors, the limitations period for such a claim, under Civil Procedure Code section 399, is two years. (See *Burt v. Irvine Co.* (1965) 237 Cal.App.2d 828, 865 [liability for director and majority shareholder negligence barred after two years].) Even crediting Appellant's view of when the limitation periods began to run – when she sold some of her stock in February 2008 – her negligence cause of action would be barred. The court properly sustained the demurrer to this cause of action.

3. Interference with Contract

The elements a plaintiff must plead for a claim for intentional interference with contractual relations are: (1) a valid contract, (2) defendant's knowledge of the contract, (3) an intentional act designed to disrupt the contractual relationship, (4) actual breach or disruption, and (5) resulting damages. (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.) In her breach of contract cause of action, Appellant alleged, "Commencing on or about July 14, 2003, and continuing until the April, 2005 Judgment in the dissolution proceeding, [Appellant] and [Markman] entered into a contract, partly oral, partly written and partly implied whereby, among other things, they mutually agreed to split their community shares in GSA on a 50-50 basis (the 'Contract'). Among other things, the Contract required that each party would receive equal value for their respective split of the community shares, both when the shares were split and thereafter; and that neither would do anything to thwart the other from receiving the full benefits of the Contract, such as diminishing the value of the other's shares or forcing she [*sic*] or him to lose their shares." Appellant alleges Respondents interfered with this contract by approving the provisions restricting Appellant's stock.

The limitations period for a cause of action for interference with contractual relations is two years. (*Trembath v. Digardi* (1974) 43 Cal.App.3d 834, 836; *Kenworthy v. Brown* (1967) 248 Cal.App.2d 298, 300; Code Civ. Proc., § 339, subd. (1).) The cause of action accrues as of the date of the wrongful act, which can be no later than the actual breach. (*Trembath v. Digardi, supra,* 43 Cal.App.3d at p. 836.)

In this case, the wrongful act must have taken place no later than April 2005, the alleged termination date of the contract between Appellant and Markman.[10] There was no contract to interfere with after that date. (See *A-Mark Coin Co. v. General Mills, Inc.* (1983) 148 Cal.App.3d 312, 320 [interference must be with existing contract].) If the discovery rule applies, then Appellant learned of the interference in May 2006, and the cause of action is still time-barred. (See *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397-398 [plaintiff "discovers" cause of action upon suspicion "'that someone has done something wrong'"].) Even crediting Appellant's argument she was not damaged until she sold some of her stock in February 2008, her cause of action for interference with contractual relations would be too late. Respondents' demurrer to this cause of action was properly sustained.

B. Constructive Fraud

"Constructive fraud consists: [¶] 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or, [¶] 2. In any such act or omission as the law specifically declares to be fraudulent, without respect to actual fraud." (Civ. Code, § 1573.) "Constructive

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10 Appellant correctly alleges the contract ended with the April 2005 judgment. At that point, it would have been merged into the family law judgment, and the contract would cease to exist. (See *In re Marriage of Umphrey* (1990) 218 Cal.App.3d 647, 656; *In re Marriage of Jones* (1987) 195 Cal.App.3d 1097, 1104.) Any subsequent action with respect to the terms of the contract would have to be brought on the judgment. (*Hough v. Hough* (1945) 26 Cal.2d 605, 610-611; see also *Westinghouse Electric Corp. v. Newman & Holtzinger* (1995) 39 Cal.App.4th 1194, 1207 [agreement incorporated into order no longer exists independently]; *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th1766, 1770 [entry of judgment extinguishes contractual rights; plaintiff's rights governed by rights on judgment].)

fraud usually arises from a breach of duty where a relation of trust and confidence exists." (*Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, 1368.)

Appellant's cause of action for constructive fraud against Respondents is based on their assisting Markman in keeping her in the dark about the proposed reorganization while she and Markman were negotiating their property settlement during their divorce.[11] In essence, her theory of liability against Respondents is a conspiracy between Markman and Respondents to breach Markman's fiduciary duty to Goldman as her spouse. (See Fam. Code, § 721, subd. (b).)

Respondents cannot be liable to Appellant on this theory regardless of when the cause of action accrued.[12] Respondents owed no spousal fiduciary duty to Appellant. It is thus impossible for them to conspire with Markman to breach this duty to Appellant. A defendant cannot be liable for conspiring to breach a duty unless he or she owes the duty. "By its nature, tort liability arising from conspiracy presupposed that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511.) "A cause of action for civil conspiracy may not arise, however, if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing . . . ." (*Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44; see also *Everest Investors 8 v. Whitehall Real Estate Limited Partnership XI* (2002) 100 Cal.App.4th 1102, 1107-1108 [conspiracy liability not possible for non-

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11 After alleging that Respondents knew about the terns of the property settlement in the divorce and the split of the GSA shares between her and Markman, Appellant alleged, "[Respondents] nevertheless agreed and conspired with . . . Markman to aid and assist him in wrongfully and secretively depriving [Appellant] of her rightful share of community assets as well as spousal and child support, in the violation of [Markman's] fiduciary duties to [Appellant]. . . "

12 Respondents raised this objection in their demurrer. We affirm a judgment of dismissal after a demurrer is sustained without leave to amend if any ground stated in the demurrer is well taken. (*E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 504.)

fiduciary; only fiduciary can be liable for constructive fraud]; *Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1597-1598 [same].)

Although Respondents may have owed Appellant a fiduciary duty as majority shareholders, they owed her no spousal fiduciary duty, the duty they are alleged to have conspired with Markman to breach. Respondents' demurrer was properly sustained as to this cause of action.

The judgment dismissing the action as to Respondents is affirmed. The demurrer was properly sustained.

III. Markman's Motion for Judgment on the Pleadings

Shortly after the court entered judgment in Respondents' favor on their demurrer, Markman moved for judgment on the pleadings. As his relationship to Appellant differed from that of Respondents, the issues confronting the court were somewhat different. The statute of limitations issues were, however, largely the same.

A. Breach of Fiduciary Duty

Markman, like Respondents, owed a fiduciary duty to Appellant as part of the group of majority shareholders. As discussed above, whether her cause of action for breach of this duty is time-barred depends on when the GSA/GHS reorganization was completed. The parties have all agreed the reorganization was completed in May 2006, more than four years before Appellant filed suit. Accordingly, Markman's motion for judgment on the pleadings based on the expiration of the limitation period was properly granted.

B. Constructive Fraud

Unlike Respondents, Markman at one time owed Appellant a fiduciary duty as her spouse. "[I]n transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take

any unfair advantage of the other." (Fam. Code, § 721, subd. (b).) This duty, however, ends when "the assets and liabilities have been divided by the parties or by a court." (Fam. Code, § 1100, subd. (e).)

In this case, as Appellant has alleged, the parties entered into a property settlement in April 2005, with some issues reserved. Judgment on the reserved issues was entered in June 2005. Markman therefore owed no spousal fiduciary duty to Appellant after June 2005, at the latest.

Appellant has alleged that Markman knew about the GSA reorganization plans *before* the April 2005 property settlement and therefore had a fiduciary obligation to tell her about them, including the effect the reorganization would have on her half of the GSA stock. Had she known about the reorganization, she would not have agreed to the amount of support or the division of assets reflected in the two judgments.

Accepting these allegations as true, as we must in a motion for judgment on the pleadings, we must still assess the timeliness of Appellant's claim. Under Appellant's theory, Markman must have breached his duty at some time before June 2005, when a judgment on the the last of the reserved issues was entered in family court. (See *Crocker-Anglo National Bank v. Kuchman* (1964) 224 Cal.App.2d 490, 494 [breach of duty gives rise to constructive fraud].) Reasonable reliance is presumed, because of the fiduciary relationship. (*Estate of Gump* (1991) 1 Cal.App.4th 582, 601.) In any event, Appellant alleged facts showing reliance – she agreed to a division of the community property and to support amounts. All of this happened no later than June 2005.

It is undisputed that Appellant found out about the proposed reorganization in May 2006, when she received a letter explaining its terms. At that point, she discovered the information that – had Markman not withheld it from her during negotiations – would have factored into the eventual property settlement and support agreement. The damage for this breach had already occurred – her agreement to a

property settlement and to support obligations that allegedly disadvantaged her.[13] All the elements of a cause of action for constructive fraud were in place no later than May 2006.

The limitations period for a cause of action whose gravamen is constructive fraud is three years. (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 607; Code Civ. Proc., § 338, subd. (d).) Appellant therefore had until May 2009 to file a cause of action on this claim. As she did not file her complaint until October 2010, the demurrer to this cause of action was properly sustained as untimely.

C. Negligence

The negligence cause of action, insofar as it includes Markman, is based on the same facts as the claim against Respondents, that is, the restriction of Appellant's GSA stock and the forced sale in February 2008. Like the claim against Respondents, it was asserted too late. (See *Burt v. Irvine Co., supra,* 237 Cal.App.2d at p. 865.) Even if Appellant was not damaged until she had to sell some of her stock, as she asserts, the limitation period on her negligence claim expired in February 2010. A cause of action filed in October 2010 is barred.

D. Breach of Contract

As discussed above, the contract Appellant alleges Markman breached ended in April 2005. She also alleged that the contract was "partly oral, partly written, and partly implied."

The limitation period on an action for the breach of a contract not in writing is two years. (Code Civ. Proc., § 339, subd. (1).) The limitation period for an action on the breach of a written contract is four years. (Code Civ. Proc., § 337, subd. (1).) The cause of action accrues at the time of the breach. (*Trustees of Capital Wholesale Electric etc. Trust Fund v. Shearson Lehman Brothers, Inc.* (1990) 221 Cal.App.3d 617, 627, fn.

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[13] The judgment provided spousal support for Appellant between December 1, 2004, and June 1, 2007.

4.) If the breach occurs in secret, the plaintiff may invoke the delayed discovery rule. (See, e.g., *April Enterprises, Inc. v. KTTV, supra*, 147 Cal.App.3d at pp. 831-832.)

In this case, the breach must have occurred no later than April 2005, when the contract merged with the judgment on the property settlement. After that point, there was no contract to breach. (See *Zastrow v. Zastrow* (1976) 61 Cal.App.3d 710, 714 [no right of action on agreement incorporated into judgment].) Even allowing for a delayed discovery of the breach – in May 2006 – Appellant's cause of action, on the written portion of the alleged agreement, is too late. Markman's motion for judgment on the pleadings on this cause of action was properly granted.

IV. Denial of Leave to Amend

Appellant argues that the trial court erred in denying her leave to amend the complaint. She asserts she can allege facts that would defeat dismissal on limitations grounds, including facts showing a relaxed duty to investigate and misleading statements regarding the prospective repurchase of her stock, all of which impeded the discovery of her claims. She also alleges that additional facts would show she was not damaged when the trial court thought she was.

But facts establishing a relaxed duty to investigate or a belated discovery of her first breach of fiduciary duty claim in an amended complaint would be either irrelevant or contradicted by the allegations of the original complaint. Appellant unquestionably knew about the reorganization and the effect it would have on her stock in May 2006; her own declaration filed in the family court establishes this fact. She even admitted she sought legal advice regarding the abridgment of her rights in her GSA stock. Her cause of action accrued when her rights were altered in May 2006; allegations regarding the subsequent operation of the repurchasing provisions cannot change when her *Ahmanson* cause of action accrued.

With respect to the other causes of action, Appellant does not adequately explain how the deficiencies can be cured by amendment. She cannot unallege the facts

that establish a time-bar, such as the facts underlying her negligence cause of action against all the defendants, her interference claim against Respondents, and her constructive fraud claim against Markman. (See *Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946.) She cannot change the law of conspiracy; Respondents cannot under any circumstances be liable to Appellant for conspiring to breach a duty they do not have. She cannot change the date when judgment was entered as to the division of property in her divorce. The trial court properly denied Appellant leave to amend the complaint as to these causes of action.

DISPOSITION

The judgments are affirmed. Appellant is to pay the costs on appeal.

Respondents have requested us to take judicial notice of excerpts from Appellant's deposition transcript. These excerpts are not necessary to the disposition of this case, and the request is therefore denied. Likewise Respondents' second request for judicial notice of certain documents from the record and of Delaware law is denied as unnecessary to the disposition of this case.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.